Supreme Court, U.S.
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No. 01-192

IN THE

Supreme Court of the United States

BOB E. FEWELL & HOLDINGSCO, INC.,

Petitioners,

v.

MIKE PICKENS, INSURANCE COMMISSIONER FOR THE STATE OF ARKANSAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, Mike Pickens, Insurance Commissioner for the State of Arkansas, petitioned the Pulaski County Circuit Court to place American Investors Life Insurance Company ("the Company") into receivership on July 11, 2000. Appendix F. The petition was filed only after Respondent worked with the Company for more than a year to cure its serious financial deficiencies. *Id.*, p. F-9. In addition, before filing the petition, Respondent's general counsel wrote Petitioners' counsel on June 30 and July 5, 2000 to ensure that Petitioners and the Company knew what action Respondent was about to take. *Id.*, pp. F-4 - F-8.

Respondent's petition was based upon two agreements reached among the Company, the Petitioners and the Respondent (*Id.*, pp. F-11 - F26) and the serious financial impairment of the Company. *Id.*, pp. F-2, F-4, F-9 - F-11. In support of his petition, Respondent attached the sworn affidavit of Mel Anderson, the Deputy Commissioner for Financial Regulation/Audit of the Arkansas Insurance Department. *Id.*, pp. F-8 - F-29.

Respondent's Deputy Receiver, Steve Uhrynowycz, and Anderson appeared before Judge John B. Plegge, Pulaski County Circuit Judge, and presented the petition and attached exhibits to the Court, including the sworn affidavit of Anderson. Uhrynowycz informed the court that demand letters for payment of the obligations under the parties' agreements had been sent and that Petitioner Robert Fewell's promissory note had not been paid and the Company's capital deficiency had not been cured. Uhrynowycz further informed the court that the failure to pay the promissory note and the failure to cure the capital deficiency constituted breaches of

the parties' agreements, in which event the Company and the Petitioners had consented to immediate entry of an order granting receivership and had waived prior notice of the entry of such an order. After asking questions of Uhrynowycz, the court asked for an order of receivership and then signed and filed the order. Appendix E.

The Permanent Injunction and Order Appointing Receiver (Appendix C) provided as follows in relevant part:

> In support thereof, the Court finds that Petitioner has made a prima facie case that Respondent's financial condition is impaired such that its continued operation outside the supervision of Petitioner will be hazardous to the general public, and to Respondent's insureds and creditors. The Court further finds that Respondent has consented to the entry of an order of permanent receivership without prior notice upon breach of covenants contained in May 28, 1999 Agreement and December 30, 1999 First Amended and Substituted Agreement, and that Petitioner has made a prima facie case of such breach of covenants.

Id., p. C-2.

The Petitioners moved to intervene and set aside the Permanent Injunction and Order Appointing Receiver and to dismiss the receivership. Appendix G. In his response to the motion to set aside the receivership order (Appendix I), Respondent denied each ground asserted by Petitioners for vacating the order and, with respect to each such ground, stated "that the movants have neither offered nor introduced any proof to substantiate their allegations." *Id.*, p. I-3.

On August 4, 2000, the court granted a hearing to the Petitioners on their motion to intervene and to dismiss the receivership. Although the Permanent Injunction and Order Appointing Receiver was premised upon the financial impairment of the Company, the failure of Petitioner Fewell to pay his promissory note, and the failure to cure the Company's capital deficiency, Petitioners argued only one issue at the August 4 hearing; *i.e.*, whether the obligation to cure the capital deficiency had accrued since they contended that no "true-up" number had been provided. Appendix E, pp. E-2 - E-3. Petitioners neither presented nor proffered any evidence to support any of the other allegations in their motion. The court denied Petitioners' request to set aside the receivership order. Appendix D.

The Arkansas Supreme Court affirmed the decisions of the trial court. Appendix A. The court agreed with Respondent that the trial court had considered the one argument made below by the Petitioners regarding the "true-up" calculation and had rejected it. *Id.*, p. A-10. In addition, the court noted that Petitioner Fewell had failed to pay his promissory note as required by the parties' agreements. *Id.* Based upon the foregoing, the court ruled the trial court correctly found that a breach of the parties' agreements had occurred. *Id.*, p. A-11.

The court then addressed the due process claim made by the Petitioners and held that Petitioners had "waived those statutory requirements under the Uniform Act by consenting to an *immediate* receivership in the event of breach without prior notice." *Id.*, p. A-13. The court concluded that the Petitioners' due process rights had not been violated and that the August 4, 2000 hearing provided them an opportunity to be heard on the legitimacy of the receivership order. *Id.*, p. A-14.

REASONS FOR DENYING THE WRIT

The Petitioners attempt to make a federal case of a state law decision based wholly upon their contractual waiver of notice before entry of an order of insurance receivership. Their first question for review completely ignores the contractual waiver by Petitioners and, instead, attempts to insert every constitutional buzzword into a twisted and misleading question in a transparent attempt to gain the Court's attention.

Their second question for review also ignores their contractual waiver of notice and their own failure to make arguments, much less present or proffer proof, at a hearing on August 4, 2000, which was granted by the trial court in response to their argument that they should have been given notice. Their characterization of the issue as whether the Due Process Clause "requires a meaningful opportunity to be heard on the issue of a domestic insurance company's right to contest" the company's placement into receivership is misleading when viewed in the context of the undisputed facts of this case.

Finally, this case is limited to its specific facts and is not likely to have far-reaching implications in insurance receiverships or other cases.

I.

THE PETITIONERS WAIVED NOTICE AND HAVE NO CONSTITUTIONAL ARGUMENTS

The Petitioners have not been denied any constitutional rights. By agreement with Respondent, Petitioners consented to an order of receivership and waived notice:

> However, upon breach of any one of the aforesaid covenants, the Company, the Parent and Fewell hereby agree and consent to the immediate commencement and entry of an order granting receivership against the Company by the Department under Ark. Code Ann. § 23-68-101 through § 23-68-132 and waive prior notice of entry of an order of permanent receivership.

Appendix F, pp. F-16 - F-17. Both the trial court and the Arkansas Supreme Court found breaches of the parties' agreement and, accordingly, ruled that Petitioners had consented to an order of receivership and had contractually waived any right to notice before the order of receivership was entered. Appendix A, p. A-13, Appendix C, p. C-2. Those holdings were proper in all respects and Respondent respectfully submits that there is no constitutional issue for review by this Court.

Respondent notes that due process varies according to the nature of the right and the type of proceedings. *Matthews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18, 33 (1976). Respondent does not concede that Petitioners had any due process rights as stockholders of the Company, particularly since Ark. Code Ann. § 23-68-105

provides that "the court may *without notice* issue an injunction restraining the insurer, its officers, directors, stockholders . . . and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court." Respondent's Appendix A (emphasis added).

More importantly, the Court has ruled that due process rights are subject to waiver by agreement. *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972). Petitioners have never, and do not in their petition to this Court, contend they could not waive any due process rights they might have.

Petitioners expressly state in their petition that they do not contend the Arkansas Uniform Insurers Liquidation Act is unconstitutional. *Petition for Writ of Certiorari*, p. 19. When coupled with their contractual waiver, that position eliminates any serious argument that their petition presents a constitutional issue for review by this Court. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (challenging the constitutionality of the prejudgment replevin laws of Florida and Pennsylvania).

II.

THE PETITIONERS WERE GIVEN AN OPPORTUNITY TO BE HEARD AND MADE ONLY ONE LIMITED ARGUMENT

Petitioners acknowledge that they were granted a hearing on August 4, 2000, but they contend that the hearing was not meaningful. If the hearing was not meaningful to Petitioners, it was due to their own failure to make arguments and either present or proffer proof.

Before the hearing on August 4, 2000, Petitioners filed a motion to intervene to which they attached a motion to dismiss. Appendix G, p. G-6. Petitioners made numerous substantive arguments in the motion, and Respondent denied each argument and stated that "the movants have neither offered nor introduced any proof to substantiate their allegations." Appendix I, p. I-3. Despite Petitioners' numerous arguments, they chose to argue only one issue at the August 4 hearing, (*i.e.*, whether a true-up calculation had been provided relative to their obligation to cure the Company's capital deficiency). Appendix E. They proffered no proof in support of that argument, and they apparently abandoned their other arguments.

Petitioners were the masters of their own fate at the August 4 hearing and had the opportunity to make any arguments they chose to make or to present or proffer any proof. Significantly, they chose to make the one argument and did not contest the serious financial impairment of the Company (Appendix C, p. C-2) or the failure of Petitioner Fewell to pay his promissory note as required by the parties' agreements. Appendix A, pp. A-10 - A-11.

No hearing is required in the situation where there is no factual dispute or the pleadings of a party do not raise an issue. *Codd v. Velger*, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977). It follows that a party cannot claim it was denied due process when it failed even to make arguments, much less present or proffer proof, at a hearing granted at the party's request. Petitioners have certainly not demonstrated that they were prevented from making arguments or presenting proof, and Respondent respectfully submits that their argument must fail.

III.

THIS CASE IS LIMITED TO ITS FACTS AND WILL NOT HAVE FAR-REACHING IMPLICATIONS IN INSURANCE RECEIVERSHIPS OR IN OTHER CASES

Finally, this case is limited by its facts and will not have far-reaching implications in insurance receiverships or in other cases. It is obvious that this case involves the unique situation where an insurance company's primary stockholder (the Petitioner Holdingsco) and the owner of that stockholder (the Petitioner Fewell) negotiated an agreement to cure the financial impairment of the company and by consenting to an immediate order of receivership in the event they breached the agreement. Not only is this situation a rare occurrence, it is not likely ever to be repeated in light of the prejudice which the policyholders and creditors have experienced as a result of the Petitioners' continued efforts to frustrate and delay Respondent's attempts to have them paid.

In addition, it is significant that Petitioners plainly concede they are not challenging the constitutionality of the Arkansas Uniform Insurers Liquidation Act. *Petition for Writ of Certiorari*, p. 19. Rather, they argue only that, in the unique circumstances of this case, Respondent's actions left their constitutional rights "ignored and unprotected." *Id.* However, the undisputed facts and the holdings of the courts below demonstrate that Petitioners consented to Respondent's actions and, when Petitioners were given the opportunity to argue otherwise on August 4, 2000, they failed to show that Respondent acted improperly.

Respondent respectfully submits that this case is not susceptible of any broad constitutional ruling and will not have implications in insurance receiverships or in other cases involving state statutory schemes. The case is limited to its facts.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTE

Arkansas Code Annotated § 23-68-105 provides as follows in pertinent part:

> (1) Upon application by the commissioner for such an order to show cause, or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents, and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.
>
> (2) The court may at any time during a proceeding under this chapter issue such other injunctions or orders as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.